FILE COPY

Supreme Court, U.S.
FILED
AUG 4 1972

In the Supreme Court of the United States

No. 72-201

October Term, 1972

WILLIAM H. STEIN,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Fred Weisman
540 Leader Building
Cleveland, Ohio 44114
Counsel for Petitioner

LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-9427

INDEX

OPINION BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

REASON FOR GRANTING THE WRIT 8

The Supreme Court of Ohio Has Deprived the Petitioner of His Property Right Without Due Process of Law in Violation of the Fourteenth Amendment to the Constitution of the United States by Its Failure to Follow Its Own Rules of Procedure, Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, in Proceedings to Discipline Members of the Legal Profession 8

CONCLUSION 18

APPENDIX:

A. Opinion of the Supreme Court of Ohio A1

B. Judgment Entry of the Supreme Court of Ohio A7

C. Order of the Supreme Court of Ohio Denying Rehearing A9

D. Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio A10

E. Order to Show Cause of the Supreme Court of Ohio A17

F. Letter of C. William O'Neill, Chief Justice of the Supreme Court of Ohio A18

CITATIONS

Cases

Brinkerhoff-Faris Trust and Savings Co. v. Hill, 281 U.S. 673 (1930) 8, 9
Collins v. Superior Court In and For L.A. County, 145 Cal. App. 2d 588, 302 P.2d 805 (1956) 9
Dawkins v. Antrobus, 17 Ch. D. 615 (1879) 8, 9
First National Bank of Atlanta v. State, 219 Ga. 144, 132 S.E.2d 263 (1963) 9
Gorin v. McFarlan, 80 Ill. App. 398, 224 N.E.2d 615 (1967) 9
Ruffalo, In re, 390 U.S. 544 (1968), rehearing denied, 391 U.S. 961 (1968) 8
Service v. Dulles, 354 U.S. 363 (1957) 9, 10, 12, 13
State v. McClintick, 21 Ohio App. 2d 154, 50 Ohio Op. 2d 250, 255 N.E.2d 885 (1970) 9
U. S. ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954) 9, 10, 11, 12, 13
Vitarelli v. Seaton, 359 U.S. 535 (1959) 9, 12, 13
Wall, Ex parte, 107 U.S. 265 (1882) 8

Constitutions, Statutes and Rules

Constitution of the United States, Amendment XIV 2, 8, 13, 17
Constitution of Ohio, Art. IV, Sec. 2 (B) (1) (g) 13
28 U.S.C. Sec. 1257(3) 2
Rules of Practice of the Supreme Court of Ohio:
Rule XVIII, Section 2 ..... 3, 14
Rule XVIII, Section 6 ..... 3, 6

Rule XVIII, Section 14 ..... 3, 14
Rule XVIII, Section 15 ..... 4, 15
Rule XVIII, Section 16 ..... 4, 15
Rule XVIII, Section 17 ..... 5, 16
Rule XVIII, Section 19 ..... 5, 7, 16

In the Supreme Court of the United States

No. .....

October Term, 1972

WILLIAM H. STEIN,
Petitioner,

vs.

CLEVELAND BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

The petitioner, William H. Stein, respectfully prays that a writ of certiorari issue to review the order and judgment of the Ohio Supreme Court dated February 9, 1972 (rehearing denied on March 10, 1972) suspending petitioner indefinitely from the practice of law in the State of Ohio.

OPINION BELOW

The opinion of the Supreme Court of Ohio, printed in Appendix A hereto, is reported at 29 Ohio St. 2d 77. The opinion or Findings of Fact and Recommendation of the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio is unreported, but same is reprinted in full in Appendix B and the relevant portions of said opinion are italicized for emphasis and clarity.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on February 9, 1972 (Appendix B). A timely Motion for rehearing was denied on March 10, 1972 (Appendix C). Petitioner's Motion for an Extension of Time to file his petition for writ of certiorari was granted on June 5, 1972, and the time period in which to file said Petition was extended to and including August 7, 1972. This petition for certiorari was filed within the extended time period. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTION PRESENTED

Whether or not it is a denial of due process of law guaranteed by the Fourteenth Amendment to the United States Constitution, for the Ohio Supreme Court to indefinitely suspend an attorney from the practice of law through a procedure not provided by and in violation of its own rules of procedure in disbarment proceeding, and where under the existing procedural rules of the Supreme Court of Ohio the punishment could not have been more severe than public reprimand, and therefore the indefinite suspension is null and void.

STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Sec. 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;

nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Rule XVIII. Disciplinary Procedure of the Rules of Practice of the Supreme Court of Ohio. (167 Ohio St. 1, amendments effective April 26, 1965. 1 Ohio St. 2d 1.)

Section 2. *Jurisdiction of Board.* The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court, as hereinafter provided,

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension for an indefinite period from the practice of law, or judge. . . .

Section 6. *Manner of Discipline.* Each attorney and counselor at law or judge found guilty of misconduct shall be disciplined. The discipline of such persons shall be

(a) a permanent disbarment from the practice of law, or

(b) suspension for an indefinite period from the practice of law subject only to reinstatement as hereinafter provided, or

(c) a public reprimand, or

(d) a private reprimand.

Section 14. *Review by Entire Board of Commissioners; Board to Administer Private Reprimand.* Upon review, said Board of Commissioners may refer the matter back to the panel for further hearing or may order a fur-

ther hearing to be presented before said Board of Commissioners or may proceed upon the certified report of the prior proceedings before the panel. Upon the final review, the Board of Commissioners may dismiss the complaint or find that the Respondent is guilty of misconduct. If the Board of Commissioners determines that a private reprimand shall be administered it shall administer such private reprimand. If the complaint is dismissed, or a private reprimand is administered, such action shall be reported to the Secretary of the Board of Commissioners, who shall notify the same persons and organizations that would have received notice if the complaint had been dismissed by the panel that heard the matter.

Section 15. *Public Reprimand; Suspension or Permanent Disbarment; Duty of Board After Review.* If the Board of Commissioners determines that a public reprimand, suspension for an indefinite period from the practice of law or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the transcript of testimony taken and an itemized statement of the actual and necessary expenses incurred in connection with such proceedings, in the office of the Clerk of this Court, and shall forthwith notify the Respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of fact and recommendations and a copy of the statement of the actual and necessary expenses incurred.

Section 16. *Show Cause Order Issued by the Court to Respondent.* On the filing of such final report of the Board of Commissioners, this Court shall issue to the Respondent an order to show cause why the report of said Board of Commissioners shall not be confirmed and a dis-

ciplinary order entered. Notice of the order to show cause shall be served by the Clerk of this Court on the Respondent and all counsel of record, personally or by registered mail.

Section 17. *Response to Order to Show Cause and Objections.* The Respondent or Relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued, and a brief in support of such objections, together with proof of service of copies thereof on the Secretary of the Board of Commissioners and on all counsel of record. All objections and briefs shall be filed in the number and form required by rules of this Court for original actions.

Section 19. *Review by Court; Reimbursement for Expenses of Board; Duty of Clerk on Entering Order.* After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, the Clerk of the Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent (at his last known address), to the Ohio State Bar Association, to the local Bar Association or associations in the county or counties in which the Respondent resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio; the United States Court of Appeals for the Sixth Circuit; and to the Supreme Court of the United States.

If a disciplinary order of the Court provides for a public reprimand, the Clerk of this Court shall arrange for publication thereof in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

If a disciplinary order of the Court provides for a permanent disbarment or suspension for an indefinite period from the practice of law, the Clerk of this Court shall arrange for publication thereof in the official reports of this Court, in the Ohio Bar publication of the Ohio State Bar Association and in a publication, if any, of the Relator local bar association.

STATEMENT OF THE CASE

On October 8, 1970, respondent filed a complaint against petitioner with the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, charging petitioner with violations of Canons of Professional Ethics, Nos. 29 and 32.

After full hearing on the issues in the case, the Board of Commissioners on Grievances and Discipline on June 16, 1971 filed its Findings of Facts and Recommendation with the Supreme Court of Ohio. The Board of Commissioners recommended that the petitioner be administered a public reprimand pursuant to Section 6(c) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio. The Board made the following observation in its findings of fact:

> "The Board has no hesitancy in stating that the discipline imposed should be less severe than indefinite suspension. In view of the uncontradicted evidence pertaining to mitigation there is perhaps some reason

to feel that a private reprimand might be adequate. However, the Board is constrained by precedent to feel that a private reprimand in this cause would be inadequate to discipline.

We would state, however, that if this matter were one of initial impression, it would be our recommendation that private reprimand be administered."

On June 17, 1971, the Supreme Court issued an Order to Show Cause to the petitioner why the recommendation of the Board, the punishment of public reprimand, should not be confirmed and the disciplinary order entered. Pursuant to Rule XVIII petitioner was permitted till July 7, 1971, to enter objections to the Findings of Fact and the Recommendation of the Board. The petitioner and respondent in writing informed the Supreme Court that no objections will be taken to the Findings of Fact and the Recommendation, and that they consent to the entering of an order of discipline in conformity with the recommendation of the Board.

The order, as required by Section 19 of Rule XVIII to be issued, was not issued by the Supreme Court. Instead, in October, 1971, the petitioner received a letter, dated October 12, 1971 (Appendix F) from Chief Justice William O'Neill of the Supreme Court of Ohio advising petitioner that the Court has decided that the matter should be assigned for oral argument before the Supreme Court of Ohio. Rule XVIII of the Rules of Practice of the Supreme Court of the State of Ohio does not provide for review by the Supreme Court where no objections were taken by the respective parties to the Show Cause order.

After oral argument, the Supreme Court of Ohio, on February 9, 1972, announced its decision to suspend the petitioner indefinitely from the practice of law.

By the above action, the Supreme Court of Ohio violated and failed to follow its own Rules of Practice, and has wrongly, but effectively changed the rules of procedure in disbarment proceedings during the pendency of the petitioner's case without notice of change to the petitioner, to the prejudice of the rights of the petitioner.

REASON FOR GRANTING THE WRIT

The Supreme Court of Ohio Has Deprived the Petitioner of His Property Right Without Due Process of Law in Violation of the Fourteenth Amendment to the United States Constitution by Its Failure to Follow Its Own Rules of Procedure, Rule XVIII of the Rules of Practice of the Supreme Court of Ohio, in Proceedings to Discipline Members of the Legal Profession.

The right to practice law is constitutionally protected as a property right and no attorney can lawfully be deprived of such right except by due process of law. *Ex parte Wall,* 107 U.S. 265 (1882). Disbarment of an attorney is a punishment or penalty imposed on the attorney and he is accordingly entitled to procedural due process. *In re Ruffalo,* 390 U.S. 544 (1968). The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government, and *state courts must accord parties due process in determining adjective* as well as substantive law of the state. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673 (1930).

Dawkins v. Antrobus, 17 Ch. D. 615 (1879), established in the common law of England the fundamental principle that even in proceedings by a private association to expel one from membership due process of law was denied if (1) the rules and proceedings were contrary to natural

justice, or (2) *the expulsion was not in accordance with the rules and by-laws of the association,* or (3) the proceedings were instituted in bad faith. Today, the second test enunciated in *Dawkins* is firmly established as a rule of administrative law. *Vitarelli v. Seaton,* 359 U.S. 535 (1959). State courts in the United States have also held that a cardinal rule of jurisprudence is that in every suit each party shall be accorded due process of law, and if a fixed and specific procedure is provided by statute, rules of court, and judicial decisions as to the route to be followed, it is a denial of due process when these rules of procedure are not followed by the courts. *Gorin v. McFarlan,* 80 Ill. App. 398, 224 N.E.2d 615 (1967). *State v. McClintick,* 21 Ohio App. 2d 154, 50 Ohio Op. 2d 250, 255 N.E.2d 885 (1970). *Collins v. Superior Court In and For L.A. County,* 145 Cal. App. 2d 588, 302 P.2d 805 (1956). *First Nat. Bank of Atlanta v. State,* 219 Ga. 144, 132 S.E.2d 263 (1963).

The United States Supreme Court has adopted this principle of law in *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra,* and applied it to administrative proceedings. This Court held that it is a denial of due process for any governmental agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it. *U. S. ex rel. Accardi v. Shaughnessy,* 347 U.S. 260 (1954). *Service v. Dulles,* 354 U.S. 363 (1957). *Vitarelli v. Seaton, supra.*

In *U. S. ex rel. Accardi,* the petitioner, by habeas corpus proceedings, attacked the validity of the denial of his application for suspension of deportation under the provisions of Section 19(c) of the Immigration Act of 1917. The procedure of Section 19(c) called for decisions at three separate administrative levels below the Attorney General—hearing officer, Commissioner, and Board of Immigration Appeals. It was provided by the regulations

that the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as it is appropriate and necessary for the disposition of the case. The Board was required to refer cases to the Attorney General for review only if (1) the Attorney General directs the Board to refer a case to him, (2) the chairman or a majority of the Board believes a case should be referred to the Attorney General, and (3) the Commissioner requests that a case be referred to the Attorney General by the Board and the Board agrees.

The facts of the *Accardi* case were that the Attorney General circulated to the Board a list of names of persons, including the petitioner's, whom he wished to have deported. Upon receipt of the list the Board deported the petitioner without exercising its independent discretion as provided by the regulations.

The Court held that as long as the regulations remained operative the Attorney General denies himself the right to sidestep the Board or dictate its decisions in any matter, and that it was a violation of due process for the Board to fail to exercise its independent discretion in violation of the regulations.

Accardi was held to be controlling in *Service v. Dulles, supra.* In *Service,* a Foreign Service Officer filed suit against the Secretary of State to challenge the validity of his discharge by the Secretary of State. The Secretary of State, by an act of Congress, had been granted the right in his absolute discretion to terminate the employment of any officer or employee of the Department of State or of the Foreign Service of the United States whenever he shall deem such termination necessary or advisable in the interest of the United States. Pursuant to authority granted by Congress, the Secretary of State promulgated

regulations with respect to procedure in such cases and reserved review by him only if the Deputy Under Secretary of State's determination was unfavorable to the employee. Under the Regulations, the action of the Deputy Under Secretary, if favorable to the employee, was final.

The facts in *Service* were the following: In 1950, the Loyalty Review Board of Civil Service Commission pursuant to "post-audit" procedures preferred charges against Service and requested that the State Department's Loyalty Security Board conduct hearings thereon. After extensive hearings, the State Department's Loyalty Security Board concluded that reasonable grounds did not exist for belief that Service was disloyal to the Government of the United States and that he did not constitute a security risk to the Department of State. These findings were approved by the Deputy Under Secretary of State, acting pursuant to authority delegated to him by the Secretary of State. Subsequently, the Loyalty Review Board of the Civil Service Commission, on post-audit, remanded the case to the Department Board for further consideration under the then existing more stringent standards. Again, the Department Board decided favorably to Service and again this determination was approved by the Deputy Under Secretary. However, on further post-audit procedure, the Loyalty Review Board of the Civil Service Commission decided to conduct new hearings itself and it found that reasonable doubt as to petitioner's loyalty existed. Thereupon, it so advised the Secretary of State who forthwith discharged the petitioner.

The Court held at p. 384 that *U. S. ex rel. Accardi* was controlling and there is no distinction to be made when the Attorney General bound himself not to exercise his discretion until he had received an impartial recommendation from a subordinate board and in this case when

the Secretary bound himself not to act at all (in cases such as this) except upon appeal by an employee from a determination unfavorable to him. The Court stated that:

> While it is of course true that . . . the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards, neither was he prohibited from doing so, as we have already held, and having done so he could not, so long as the Regulations remained unchanged, proceed without regard to them, at p. 388.

U. S. ex rel. Accardi and *Service* were followed in *Vitarelli v. Seaton, supra.* In *Vitarelli,* petitioner, an employee of the Department of the Interior brought suit against the Secretary of the Department of the Interior challenging the validity of his discharge from his employment. The Secretary of the Department of the Interior was granted by statute the authority to discharge summarily an employee in petitioner's status without the giving of any reason for the discharge, and there were no Department regulations precluding such a course of conduct. In the case of the petitioner the Secretary of the Interior decided to give reasons for his discharge, being the interest of national security. The Court held that "since the Secretary gratuitously decided to give a reason and that reason was national security, he was obligated to conform to the procedural standards he had formulated in Order No. 2738 for the dismissal of employees on security grounds. Having chosen to proceed against petitioner on security grounds, the Secretary was bound by the regulations which he himself had promulgated for dealing with such cases, even though without such regulation he could have discharged petitioner summarily."

Justice Frankfurter stated in his concurring opinion that:

> If dismissal from employment is based on a definite procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed. See, *Service v. Dulles,* 354 U.S. 363. This judicially evolved rule of administrative law is now firmly established and if I may add, rightly so. He that takes the procedural sword shall perish with that sword. at 546.

Although, *Service* and *Vitarelli* were statutory decisions, they were made in light of the constitutional interpretation and decision made in *U. S. ex rel. Accardi* of the requirements of due process of law, and they together with *Accardi* and the other cases cited *supra* interpreting the common law, authoritatively establish the principle of law that *where a state governmental agency or court promulgates rules of procedure to be followed by its citizens in adjudications of their rights, even though no such rules of procedure are required to be promulgated, such agency or court must scrupulously follow such rules, and if it fails to follow or violates such rules in the course of adjudicating the rights of a citizen it constitutes a denial of procedural due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.*

Procedure of the Supreme Court of Ohio in Disbarment Proceedings, Rule XVIII, Disciplinary Procedure

Article IV, Section 2 (B) (1) (g) of the Constitution of the State of Ohio grants to the Supreme Court of Ohio original jurisdiction in all matters relating to the discipline of a member of the legal profession. Pursuant to this jurisdiction, the Supreme Court itself may hear and

decide each and every disciplinary action against a member of the bar of the State of Ohio. However, the Supreme Court chose to delegate its jurisdiction to an administrative arm of the Court, to wit: The Board of Commissioners on Grievances and Discipline. The Ohio Supreme Court thus promulgated rules of procedure to be followed in disciplinary proceedings, and specifically Rule XVIII of the Rules of Practice of the Supreme Court of Ohio effective March 11, 1964 (167 Ohio St. 1, amendments 1 Ohio St. 2d 1).

Section 2 of Rule XVIII delineates the jurisdiction of the Board of Commissioners. The Board is "empowered and charged to receive, entertain, inquire into, take evidence, make findings and submit recommendations to this Court *as hereinafter provided* . . . concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law. . . ." (Emphasis added). It is evident from this section that the jurisdiction of the Board is to be determined by an examination of all sections of Rule XVIII.

A review of the provisions of Rule XVIII clearly indicates that the Supreme Court of Ohio conferred or transferred its jurisdiction under the Constitution of the State of Ohio from itself to the Board of Commissioners. The Board of Commissioners is thus granted plenary and final jurisdiction, reserving the right of the Supreme Court to review the actions of the Board in only one instance: when objections by the parties are made to the Recommendations of the Board if the punishment is greater than private reprimand.

Section 14 provides that the "Board of Commissioners may dismiss the complaint or find that the respondent is guilty of misconduct." It further provides that "if the

Board of Commissioners determines that a private reprimand shall be administered, it shall administer such private reprimand." *No* provision exists in this section indicating that such action is appealable by the parties to the Supreme Court, or that it is reviewable *sua sponte* by the Supreme Court. The Board's determination is final, under this section.

Section 15 delineates the procedure to be followed if the punishment determined by the Board is to be more severe than a private reprimand. It provides that

> If the Board of Commissioners determines that a public reprimand, suspension for indefinite period from the practice of law, or permanent disbarment is merited, said Board of Commissioners shall thereupon make a final certified report of such proceedings, including its findings of fact and recommendations, and shall file the same, together with the expenses . . . and shall forthwith notify the respondent and all counsel of record of such action, enclosing with such notice a copy of the findings of facts and recommendations and a copy of the statement . . . of . . . expenses.

Section 15, again, does not provide for any procedure for review by the Supreme Court, nor does it provide that such findings of fact are to be submitted to the Supreme Court for approval. It provides merely for notice to the parties of the *final* determination of the Board.

Section 16 specifies what the function of the Supreme Court is at this point in the proceedings. The Supreme Court's sole function is to "issue to the respondent an Order to show cause why the report of said Board of Commissioners shall not be confirmed and a disciplinary order entered." Section 16, again, does not provide for any review by the Supreme Court, *sua sponte* or by motion of the parties.

Section 17 provides that "the respondent or relator within twenty (20) days after the issuance of an order to show cause may file objections to the findings or recommendations of the Board of Commissioners and to the entry of a disciplinary order or to the confirmation of the report on which the order to show cause was issued. . . ."

Section 19 specifies the only instance when the final determination of the Board is reviewable by the Supreme Court. It provides that the Supreme Court may conduct a hearing upon the objections filed to the Findings and Recommendation of the Board. It further provides that "after hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper . . ." This section clearly provides that the Supreme Court *may only conduct a hearing if objections are taken.* It is clear that a "proper order" which the Court may enter pursuant to this section is (1) if objection is taken, the same order as directed by the Board to be issued or a modified order which the Court may deem proper after said hearing, or (2) if no objections are taken, only the order directed by the Board is to be issued. Therefore, absent objections, the only function of the Supreme Court is to enter a disciplinary order of "public reprimand" pursuant to the recommendation of the Board. Under Rule XVIII, the Supreme Court of Ohio may not *sua sponte,* review the actions of the Board where no objections were taken to the Findings of Fact and the Recommendations. This is true, even though, absent Rule XVIII, the Supreme Court has original and plenary jurisdiction. Once, however, the Supreme Court established the Board and issued Rule XVIII limiting its own right to review, the Court must scrupulously follow Rule XVIII. If the Court wanted to retain the right to review all cases *sua sponte* it could and should have so provided in Rule XVIII. Having promulgated Rule XVIII, the Supreme

Court has bound itself by it, and your Petitioner has the right to its fair and just application and enforcement.

Procedure Used by the Supreme Court in Petitioner's Case

In the instant case which concerns the Petitioner, William H. Stein, the Board of Commissioners filed its Findings of Fact and Recommendation with the Supreme Court. The Board recommended the disciplinary action of public reprimand. Show Cause Order was issued by the Supreme Court to the Petitioner, William H. Stein. *No* objections were filed by the Petitioner, William H. Stein, nor by the respondent, The Cleveland Bar Association, to the Findings of Fact and Recommendation, in response to the Show Cause Order. At this point, pursuant to Rule XVIII, the Supreme Court of Ohio had but one function—to enter the disciplinary order and under its own Rule XVIII could not take any other course of action.

Instead, however, the Chief Justice of the Supreme Court of Ohio, by letter (Appendix F) in violation of Rule XVIII, and without any authority whatsoever, assigned the Petitioner's case for oral argument, and henceforth *suspended Petitioner indefinitely from the practice of law,* contrary to the recommendation of the Board. The imposition of punishment by indefinite suspension of the Petitioner by the Supreme Court of Ohio, being violative of its own rules, constitutes a severe deprivation of his property right without due process of law. This right of "due process" is guaranteed by the Fourteenth Amendment to the Constitution of the United States. The order of "indefinite suspension of the Petitioner from the practice of law" should be declared null and void, therefore, on the basis of the reasons and authorities cited in this petition.

CONCLUSION

Wherefore, for the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

FRED WEISMAN
540 Leader Building
Cleveland, Ohio 44114
Counsel for Petitioner

APPENDIX A

Opinion of the Supreme Court of Ohio

(29 Ohio St. 2d 77, Decided February 9, 1972)

D. D. No. 71-4

THE SUPREME COURT OF OHIO
STATE OF OHIO, CITY OF COLUMBUS, SS.

CLEVELAND BAR ASSOCIATION,
Relator,

vs.

WILLIAM H. STEIN,
Respondent.

Attorneys at law—Misconduct—Indefinite suspension from practice—Acts warranting—Failure to file income tax returns.

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline.

William H. Stein, the respondent herein, is 46 years old and was admitted to the practice of law in Ohio in 1951 by examination. He has practiced continuously since that time in Cleveland, specializing in the field of municipal law. He has in the past represented several municipalities in Cuyahoga County.

The relator, the Cleveland Bar Association, instituted this proceeding before the Board of Commissioners on Grievances and Discipline, charging respondent with violations of Canons of Professional Ethics, Nos. 29 and 32.

On April 2, 1969, an information was filed in the United States District Court for the Northern District of Ohio, Eastern Division, charging in four counts that respondent wilfully failed to file federal income tax returns for 1963, 1964, 1965 and 1966, in violation of Section 7203, Title 26, U. S. Code. On that same day the respondent entered a plea of guilty to the charge of failing to file the 1965 return and the U. S. Attorney moved for dismissal of the other three charges, which was granted by the court.

The counts of the information alleged that, in 1963, respondent had a gross income of $30,970; in 1964, a gross income of $27,190; in 1965, a gross income of $38,774.06; and in 1966, a gross income of $29,086.79.

Respondent's plea of guilty was accepted. He appeared for sentencing on May 28, 1969, at which time he was fined $1,000 and placed on probation for one year.

The findings of fact of the Board of Commissioners point out that the only information which the Cleveland Bar Association had regarding respondent's plea of guilty to this charge is a letter, dated April 3, 1969, written by respondent in which he advised the executive secretary that he had entered such a plea. The letter stated that, while there was an admitted tax liability of $2,375.94 in 1963, $2,260.01 in 1964, $4,011.54 in 1965 and $1,869.23 in 1966, a portion of the tax liability for each year had been covered by withholding taxes. This letter stated further that respondent had not been motivated in any way by an intent to evade income tax responsibility or to violate the law, but had resulted from a personal breakdown relating to his personal affairs and professional responsibilities during the years involved. That letter concluded with the following paragraph:

"As a lawyer I fully realize my solemn oath and responsibility to uphold and encourage respect for the laws of our country and the Canons of my profession, and I therefore submit to the Bar Association for review my conduct as set forth in this letter."

Respondent testified under oath before the hearing panel of the Board of Commissioners on Grievances and Discipline. He stated that, commencing in 1961, he was involved in extreme marital difficulties, resulting in a separation from his wife and son in 1964 and ultimately a divorce in 1968; that, commencing in 1963, his financial circumstances were deplorable and he was required to borrow substantial sums of money to make expenses; that he did not know that he could file a return without full payment of his tax obligation and that in March 1964, when his 1963 income tax, amounting to $2,900, was due, he was unable to pay it; that he did not file a return and he did not know that it was a crime to fail to file this return; that in subsequent years at tax payment time he did not have the money to pay the current tax, nor for the prior years, and the matter simply compounded itself until early in 1969, when the Internal Revenue Service reminded him of his deficiency. The filing of the information and his plea of guilty followed.

Counsel for relator recommended to the panel that if discipline was found to be appropriate, a public reprimand be imposed.

The board findings were as follows:

"1. Under the evidence and the facts developed and in consonance with the cases cited on page two, the conviction of the respondent for a wilful failure to file his federal income tax return for the calendar year 1965, which was a violation of Section 7203, Title 26,

U. S. Code, was not a conviction of a crime involving moral turpitude.

"2. Based upon the admitted facts in this cause, the findings made in similar cases which have come before this board and the case law announced by the Supreme Court of the State of Ohio, the board finds that the conviction of the respondent in the incident case constituted a violation of Canons 29 and 32."

The board recommended that respondent be administered a public reprimand pursuant to Section (6)(c) of Rule XVIII of the Rules of Practice of this Court.

Mr. Lewis Einbund, Mr. Charles B. Donahue, II, and *Mr. Lawrence M. Bell,* for relator.

Mr. Fred Weisman, for respondent.

Per Curiam. Failure of an attorney to timely file his income tax return constitutes a violation of Canon 29 and Canon 32 of the Canons of Professional Ethics, and also violates Rule XVIII(5)(a) of the Rules of Practice of this court.

Canon 29, entitled "Upholding the Honor of the Profession," reads, in part:

"* * * He should strive at all times to uphold the honor and to maintain the dignity of the profession * * *."

Canon 32, entitled "The Lawyer's Duty in Its Last Analysis," reads, in part:

"* * * He must also observe and advise his client to observe the statute law * * *."

Rule XVIII, entitled "Disciplinary Procedure," defines, in Section (5)(a), what actions constitute misconduct:

> "Misconduct shall mean * * * any violation of the Canons of Professional Ethics * * *."

Any candor of respondent reflected in the facts set forth above comes too late, and the question which concerns us is the degree of discipline.

We recognize that in the past there has not been a consistent policy adhered to by this court in the discipline applied in cases of this nature. And we understand how the Board of Commissioners on Grievances and Discipline, in the light of certain precedents, arrived at its recommendation that a public reprimand be imposed as discipline.

However, we choose not to follow this recommendation under the facts reflected in the record in this proceeding. We are of the opinion that the time has come to establish and publicly announce a pattern of consistency in the imposition of discipline in cases of *wilful* failure by an attorney licensed to practice in Ohio to make an income tax return.

Respondent pleaded guilty to the crime of *wilfully* failing to make an income tax return for the year 1965. Charges involving similar offenses for three other years were dismissed in the United States District Court.

The law which respondent failed to respect affects many millions of persons in the United States. They are required to obey that law whether they like it or otherwise. Each of those persons is charged with knowledge of the existence of that law. There is nothing new about this federal requirement to file an income tax return because

our country has had such laws following the adoption of the Sixteenth Amendment to the United States Constitution on February 25, 1913.

One of the fundamental tenets of the professional responsibility of a lawyer is that he should maintain a degree of personal and professional integrity that meets the highest standard. The integrity of the profession can be maintained only if the conduct of the individual attorney is above reproach. He should refrain from all illegal conduct. Anything short of this lessens public confidence in the legal profession—because obedience to the law exemplifies respect for the law.

For the foregoing reasons this court is of the opinion that the acts committed by respondent warrant disciplinary measures more severe than a public reprimand. Consequently, we impose upon respondent the discipline of indefinite suspension from the practice of law.

Judgment accordingly.

O'NEILL, C. J., SCHNEIDER, HERBERT, COLE, CORRIGAN, STERN and LEACH, JJ., concur.

COLE, J., of the third Appellate District, sitting for DUNCAN, J. JUDGE COLE of the Court of Appeals was, pursuant to Section 2 of Article IV of the Constitution of Ohio, duly directed by the Chief Justice "to sit with the justices of the Supreme Court in the place and stead of" JUSTICE DUNCAN and JUDGE COLE did so and heard and considered this cause prior to the resignation of JUSTICE DUNCAN on November 28, 1971.

APPENDIX B

Judgment Entry of the Supreme Court of Ohio

(February 9, 1972)

No. D. D. 71-4

THE SUPREME COURT OF OHIO
STATE OF OHIO, CITY OF COLUMBUS, SS.

CLEVELAND BAR ASSOCIATION,
Relator,

vs.

WILLIAM H. STEIN,
Respondent.

ON CERTIFIED REPORT BY THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

It appearing to the Court that the Board of Commissioners on Grievances and Discipline filed its Final Report in this Court on June 17, 1971, recommending that the respondent, William H. Stein, be publicly reprimanded pursuant to Section 6 (c) of Rule XVIII of the Rules of Practice of this Court, and it further appearing that respondent filed objections to Final Report of the Board of Commissioners on Grievances and Discipline, this cause was argued by counsel. On consideration thereof, it is ordered and adjudged by this Court that the respondent, William H. Stein, be indefinitely suspended from the practice of law pursuant to Section 6 (b) of Rule XVIII of the Rules of Practice of this Court.

The respondent, William H. Stein, is hereby ordered to cease and desist from the practice of law in any form and is forbidden to appear on behalf of another before any court, judge, commission, board, administrative agency or other public authority. It is further ordered that he be forbidden to counsel or advise, or prepare legal instruments for others or in any manner perform services of any kind for others which would constitute the practice of law. He is also forbidden to hold himself out to another or to the public as being authorized to perform legal services, and he is hereby divested of each, any and all of the rights, privileges and prerogatives customarily accorded to a member in good standing of the legal profession of Ohio.

It is further ordered that the respondent, William H. Stein, surrender his Certificate of Admission to Practice to the Clerk of this Court forthwith and that his name be stricken from the roll of attorneys maintained by this Court.

It is further ordered that the respondent, William H. Stein, pay the cost of these proceedings taxed in the amount of Seven Hundred Thirty Six Dollars and forty-three cents ($736.43).

It is further ordered that the Clerk of this Court issue certified copies of this entry as provided for in Section 19, Rule XVIII of the Rules of Practice of this Court.

Approved: /s/ C. WILLIAM O'NEILL, Chief Justice

APPENDIX C

Order of the Supreme Court of Ohio Denying Rehearing

(March 10, 1972)

No. D. D. 71-4

THE SUPREME COURT OF OHIO
STATE OF OHIO, CITY OF COLUMBUS, SS.

CLEVELAND BAR ASSOCIATION,
Relator,

VS.

WILLIAM H. STEIN,
Respondent.

REHEARING

It is ordered by the court that rehearing in this case is denied.

APPENDIX D

Findings of Fact and Recommendation of the Board of Commissioners

Case No. 160

BEFORE THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

In re Complaint against:
WILLIAM H. STEIN,
Respondent,

CLEVELAND BAR ASSOCIATION,
Relator.

FINDINGS OF FACT AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

This matter came on for hearing on January 22, 1971 before the duly appointed Hearing Panel of the Board of Commissioners on Grievances and Discipline on the complaint, answer thereto, and the evidence and was concluded on the same date.

The Respondent, William H. Stein, age 46, was admitted to the practice of law in 1951 and has practiced continuously since that time, specializing in the field of municipal law. He has in the recent past and at the time of the hearing continued to represent one or more municipalities in Cuyahoga County.

On April 2, 1969, an Information was filed in the United States District Court for the Northern District of

Ohio, Eastern Division, charging in four counts that Respondent wilfully failed to file federal income tax returns for the calendar years 1963, 1964, 1965 and 1966 in violation of Section 7203, Title 26, U. S. Code. On April 2, 1969, the Respondent entered a plea of guilty to the charge relating to failure to file a United States income tax return for the calendar year 1965 and thereupon, upon motion of the United States Attorney the charges pertaining to the years 1963, 1964 and 1966 were dismissed.

The counts of the Information reveal that in 1963 Respondent had a gross income of $30,970; in 1964 a gross income of $27,190; in 1965 a gross income of $38,774.96 and in 1966 a gross income of $29,086.79.

The Respondent's plea of guilty was accepted and he appeared for sentencing on May 28, 1969, at which time he was fined a sum of $1,000 and placed on probation for a period of one year.

It is significant to relate that the only information that the Cleveland Bar Association has pertaining to the foregoing matters is a letter dated April 3, 1969, written by Mr. Stein in which he advised the executive secretary that he had pled guilty to a charge of violating Section 7203, Internal Revenue Code, 26 U. S. Code. That letter discloses that while there was an admitted tax liability of $2,375.94 in 1963, $2,260.01 in 1964, $4,011.54 in 1965 and $1,869.23 in 1966, that a portion of the tax liability for each year had been covered by withholding taxes. The letter further stated that Respondent had not been motivated in any way by an intent to evade income tax responsibility or to violate the law, but had resulted from a personal breakdown relating to his personal and professional responsibilities and affairs during the years involved. That letter concluded with the following paragraph:

> "As a lawyer I fully realize my solemn oath and responsibility to uphold and encourage respect for the laws of our country and the Canons of my profession, and I therefore submit to the Bar Association for review my conduct as set forth in this letter."

The Cleveland Bar Association apparently made no investigation or other determination in connection with the foregoing matters except to file the complaint on October 8, 1970, and no explanation for the delay from April of 1969 to that date was advanced.

It was stipulated that the Exhibits A through E which were attached to the complaint were authentic; the Relator tendered the same into evidence and thereupon rested. Counsel for the Respondent then moved to dismiss the complaint upon the basis that the complaint and evidence does not support a charge that:

1. moral turpitude had been involved
2. a violation of Canon 29 had occurred, and
3. a violation of Canon 32 had occurred.

The Chairman of the Panel, after consultation with the other members of the Panel, ruled that under the evidence presented no issue of moral turpitude was presented for ruling by the Panel, but that under the law of the State of Ohio as established by the Supreme Court in *Dayton Bar Association v. Prear,* 175 Ohio St. 543; *Cleveland Bar Association v. Bilinski,* 177 Ohio St. 43; *Ohio State Bar v. Hart,* 15 Ohio St. 2d 97, and *Cincinnati Bar Association v. Leroux, Weber and Bostick,* 16 Ohio St. 2d 10, that a plea of guilty to a charge of having wilfully failed to file income tax returns did present issues involving violation of Canons 29 and 32 of the Canons of Ethics.

Thereupon counsel for Respondent adduced testimony from practicing attorneys who had known Respondent and

still know him on both a professional and social basis that Mr. Stein had and has a keen legal mind, was and is dedicated to his profession, enjoyed and enjoys a fine reputation for legal competence among attorneys and the bench with no exceptions other than at times he tended to procrastinate.

The Respondent was sworn and testified, admitting that he had been faced with an Information containing four counts that he wilfully failed to pay income tax for the years 1963, 1964, 1965, and 1966 and that he entered a plea of guilty to the 1965 count and thereupon the other counts were dismissed. He asserted that commencing in 1962 he was involved in extreme marital difficulties with a separation from his wife and son in 1963 which ultimately resulted in a final divorce in 1968; that commencing in early 1963 his financial circumstances were deplorable and it was necessary that he borrow substantial sums of money to keep his head above water; that he did not know that he could file a return without payment in full of taxes and that in March of 1964 when the 1963 tax was due he realized that he had to pay $2,900 in taxes and he didn't have it. So he didn't file or pay although he realized he owed it, but that he did not know that it was a crime not to file the return. He stated that on subsequent years at tax payment time he didn't have the money to pay the current taxes or the prior years and the matter simply compounded itself until early 1969, and when the government brought his deficiency to his attention, he felt the only thing proper was to enter a plea of guilty although his counsel had advised him not to. He advised the Panel that he was aware of his deficiencies but he believed that he had corrected them and that he was most anxious to do anything he could to continue the practice of his profession and to enjoy the respect of his fellow members in the profession.

Mr. Daniel McCarthy, who specializes in income tax law, testified on behalf of the Respondent, stated that he had made an independent investigation of the facts and circumstances surrounding Respondent's failure to file tax returns; had accepted the responsibility of representing him with the Internal Revenue Department and in court; that it was his conclusion after investigation that the Internal Revenue Department would be unable to successfully prosecute the charges brought against Respondent; and that he so advised the Respondent. However, Respondent made his own decision that he would plead guilty rather than contest the matter. Mr. McCarthy stated that it was his conclusion that Mr. Stein had been negligent, but had not been guilty of criminal misconduct.

It was developed that Respondent had prepared his income tax returns each year, but had not filed them nor had he paid the tax.

The Respondent rested. Relator presented no evidence in rebuttal and thereupon final arguments of counsel were made.

At the conclusion of final arguments, inquiry was made of counsel for Relator concerning their recommendation as to the degree of discipline that should be imposed if the Panel decided that the cause was one in which discipline should be administered. It was the recommendation of Relator that the Respondent be indefinitely suspended from the practice of law. Counsel for Respondent recommended that maximum discipline be private reprimand.

Several days following submission of the cause, trial counsel for Relator called the Chairman of the Panel and thereafter confirmed the call by letter and modified the prior recommendation and urged the Panel that if discipline were found to be appropriate, that the maximum extent thereof be public reprimand.

Findings

The Board finds as follows:

1. Under the evidence and the facts developed and in consonance with the cases cited on page two, the conviction of the Respondent for a willful failure to file his federal income tax return for the calendar year 1965, which was a violation of Section 7203, Title 26, U.S. Code, was not a conviction of a crime involving moral turpitude.

2. Based upon the admitted facts in this cause, the findings made in similar cases which have come before this Board and the case law announced by the Supreme Court of the State of Ohio, the Board finds that the conviction of the Respondent in the incident case constituted a violation of Canons 29 and 32.

Discussion

There was considerable testimony introduced in mitigation on behalf of the Respondent. The record indicates that he fully cooperated with the Internal Revenue Service when brought to task; that there was a complete absence of indicia of fraud or duplicity; that the Respondent had serious marital difficulties during the complete period during which the incidents of failing to file tax returns occurred; that the Respondent bore an excellent reputation prior to his conviction and has been able to continue in the practice of law, maintaining a good relationship with clients and professional associates.

The Board further concludes that the Respondent faced up to his responsibilities as a member of the legal profession when he wrote the letter of April 3, 1969 to the Cleveland Bar Association wherein he submitted his shortcomings and deficiencies to review.

While the recommendations of counsel for the Relator and Respondent concerning the degree of discipline bear

some weight, those recommendations cannot effect a limitation on the authority and responsibility of the Board to render its decision and recommendation in a manner consistent with precedent.

The Board has no hesitancy in stating that the discipline imposed should be less severe than indefinite suspension. In view of the uncontradicted evidence pertaining to mitigation there is perhaps some reason to feel that a private reprimand might be adequate. However, the Board is constrained by precedent to feel that a private reprimand in this cause would be inadequate discipline.

We would state, however, that if this matter were one of initial impression, it would be our recommendation that private reprimand be administered.

RECOMMENDATION

The Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio therefore recommends that the Respondent, William H. Stein, be administered a public reprimand pursuant to Section 6(c) of Rule XVIII of the Rules of Practice of the Supreme Court of Ohio. (Italics supplied)

/s/ GORDON T. KINDER
Chairman, Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

/s/ WILLIAM D. RADCLIFF
Secretary, Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

APPENDIX E

Order to Show Cause of the Supreme Court of Ohio

(June 17, 1971)

No. D. D. 71-4

THE SUPREME COURT OF OHIO
STATE OF OHIO, CITY OF COLUMBUS, SS.

CLEVELAND BAR ASSOCIATION,
Relator,

vs.

WILLIAM H. STEIN,
Respondent.

ORDER TO SHOW CAUSE

It appearing to the Court that the Board of Commissioners on Grievances and Discipline has filed a final report in the office of the Clerk of the Supreme Court, recommending that the respondent, William H. Stein, be given a public reprimand, it is ordered by the Court that the respondent, William H. Stein, show cause, why the recommendation of the Board of Commissioners shall not be confirmed and the disciplinary order entered.

It is also ordered that objections to the findings and recommendation of the Board of Commissioners together with a brief in support of objections will be due on or before July 7, 1971.

/s/ C. WILLIAM O'NEILL
Chief Justice

APPENDIX F

Letter of C. William O'Neill, Chief Justice of the Supreme Court of Ohio

THE SUPREME COURT OF OHIO
COLUMBUS

October 12, 1971

Mr. Fred. Weisman
Attorney at Law
540 Leader Building
Cleveland, Ohio 44114

Re: DD No. 71-4, Cleveland Bar Association v. Stein

Dear Mr. Weisman:

Upon initial consideration of the above captioned case the Court has decided that this matter should be assigned for oral argument before the Court.

I realize that neither party filed any objections to the recommendation of the Board of Commissioners on Grievances and Discipline. If, in view of the assignment for oral argument, the parties now wish to filed objections and briefs, the respondent's objections and brief shall be filed on or before October 28, 1971, and the relator's brief shall be filed within fifteen days thereafter.

This case will be assigned for oral argument on Wednesday, November 17, 1971, and the Court will expect counsel for both parties to appear and to present oral argument. Argument shall be limited to fifteen minutes for each side.

Very truly yours,

/s/ C. WILLIAM O'NEILL
Chief Justice